UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

MADELAINE CHOCOLATE NOVELTIES, INC., **-And-** **LOCAL 1222, UNITED PROFESSIONAL SERVICE EMPLOYEES UNION.**	**CASE 29-CA-222257**

REPLY BRIEF OF RESPONDENT, MADELAINE CHOCOLATE NOVELTIES, INC. IN SUPPORT OF EXCEPTIONS TO DECISION OF JEFFREY P. GARDNER, ADMINISTRATIVE LAW JUDGE

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By: Abraham Borenstein, Esq.
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The General Counsel (GC) does not acknowledge that the burden of proof in this case is on the GC to prove all of the elements of the alleged violations. The result is an answering GC Brief which claims, in 29 intense and repetitive pages, that this is a simple case, and in all 29 simple pages ignores that Madelaine Chocolate Novelties, Inc. ("Madelaine") has explicit contractual rights, never bargained away, and the burden of proving that such rights indeed were bargained away are on the GC.

The question presented in this case is: did Madelaine have the legal and contractual right to elect not to pay a shift differential to its employees in its Afternoon and Night shifts after the New York Minimum Wage accelerated hourly pay well past existing wages? The ALJ mistakenly, now supported by the GC, decided Madelaine did not have such right of election asserting that a purported "Past Practice" overrode Madelaine's contract rights. His Decision is wrong.

We demonstrated in detail in Madelaine's Brief that despite a purported "Past Practice" allowing a "shift differential" for those two shifts, the existing Collective Bargaining Agreement ("CBA") (GC-7)[1] provided Madelaine the option to pay the "shift differential" or not to pay it. Madelaine had the right to rely on the CBA and

[1] References are to exhibits in evidence by the respective parties or to Transcript Reference (TR) at the trial.

Madelaine did nothing wrong when it relied on its CBA. The ALJ discounted or overlooked Madelaine's rights under the CBA and came to the wrong conclusion.[2]

While the GC poo poos it, we urge the Board's attention to the application of Article 8, Paragraph B, the specific detailed provision in the CBA, (Ex GC-7) pursuant to which Madelaine always had the right at any time to pay the minimum wage to new employees, or current employees. The ALJ did not evaluate that central paragraph and the GC now seeks to explain it away, but in incomprehensible terms. Madelaine in good faith had every right to rely on this Paragraph, and the ALJ's opinion is flawed fundamentally. His Decision must be reversed and the Complaint dismissed.

THE FACTS[3]

The following crucial provision was included in Article 8 of the 2004-2007 CBA: " [I]t is expressly agreed that any employee who will receive the benefit of an increase in the New York State or Federal minimum wage in the period which increases equal to or greater than the proposed increase," (applicable to that CBA), "will not receive any increase in contract year two other than the minimum wage." That means, shift differential or not, no increase other than the minimum wage. This

[2] Indeed, the ALJ's review of the facts, and contractual analysis is materially flawed as set forth in Madelaine's Brief. The ALJ ignored a crucial provision in the CBA Article 8.B. of the CBA, which is determinative of the issue and also made serious and material factual errors elucidated in Madelaine's Brief.

[3] The Facts are set forth in detail in Madelaine's Brief. We highlight certain aspects here for further consideration.

important information establishes that from the outset of the bargaining relationship between these parties, there was an understanding, an agreement, that as the minimum wage rose, the minimum wage rate was going to control how much employees could be paid, in Madelaine's discretion, irrespective of wage differentials. Unwritten non-contractual differentials, even if they did exist, did not require commensurate increases as the minimum wage rose.

It should once again be emphasized that there is no mention of Shift Differential for Afternoon or Night shifts anywhere in any CBA.[4]

In the 2007-2010 CBA, Article 8 was again present. The 2007-2010 CBA was replaced by the CBA that applies here, the 2010-2013 CBA, which continues in effect, unmodified. "All employees hired after the effective date of this CBA may, in the sole discretion of the employer, be paid the minimum wage prevailing, under New York or Federal law, as applicable, the minimum wage. The Employer may elect to pay none, some, or all of the new hires, during any time this CBA is applicable, with a wage rate greater than the minimum wage". "…may elect at any time" needs to be emphasized. "…in the sole discretion of the Employer" needs to be emphasized. "…new hires" needs to be emphasized. (Ex R-1).

[4] The ALJ incorrectly (Decision P.3 LL 20-25) and the GC refers to references to shift differential in the CBA as a source of making such differential a binding past practice. Madelaine strongly disputes that conclusion. We discuss such incorrect findings in Madelaine's Brief.

In 2012, with approximately a year remaining in the duration of the 2010-2013 CBA, Superstorm Sandy struck the Rockaway Beach, New York, peninsula where Madelaine is located. Sandy catastrophically terminated Madelaine's operations. (TR 47-48). This period of layoff is a crucial and determinative fact.

The termination of Madelaine's operations had profound impact on the Respondent, the Union and the Employees. Manufacturing ceased. (TR 47-48). Aside from a handful of Employees, all of the bargaining unit employees were laid off indefinitely. (TR 175-178). That layoff exceeded six (6) months. (TR 175-178). All Madelaine Employees contractually were terminated. (TR 175-178; GC-7, P 32-33).

The fact that Madelaine was shut down for nine months is a point of emphasis in this case. The ALJ failed to find that the Employees who were contractually laid off for nine months after Hurricane Sandy were terminated. The ALJ made his finding despite the indisputable fact that they were laid off, i.e., terminated for more than six (6) months, which six (6) months layoff in the clear language of the CBA was a per se termination. The applicable CBA 2010-2013 plainly states that the Employees were terminated as a matter of fact after six (6) months of layoff. Madelaine as a going concern. It did not grieve non-payment of severance. It did not

complain. Nor did it contest rehire rates of such terminated employees. Thus, upon rehire they are "new" employees.

The 2010-2013 CBA continued in effect after its expiration. Periodic negotiations continued. The Employer honored its terms albeit that it expired more than 5 years ago. (TR 12-175; 189). There were numerous sessions and negotiations between the Union and the Respondent over the past six years, and more. There has been no change to even one CBA term. We submit as a matter of fact, these parties have been at an impasse for years, over every conceivable matter in the CBA.

The 2010-2013 CBA contains no discussion of shift differential in its wage provisions. Article 7, Hours of Work (Ex R-1). (PP. 10-11). The relevant section of the CBA discusses the various shifts. As stated, there is no provision for shift-differential pay in Article 7.

While Madelaine was regrouping and rehiring prior employees as new employees, minimum-wage increases in New York State[5] had the effect of increasing the wages of many of the day-time hourly employees to an amount equal to or greater than the wages of Night-employees,
even with the shift differential.[6]

[6] Scott Wright credibly testified that the reason for the inclusion of Article 8, Paragraph B in the various CBAs was expressly to give Madelaine the ability to deal with increases in the minimum wage. This was a concern well before

The result of the implementation of the minimum-wage increases to $13 and $15, was that the wages of prior and returning employees were flattened out and became in many cases, equal, even though the recalled employees, prior to the minimum wage increase, may have had a higher hourly-rate compensation than new employees. (See generally 172-178).

Regarding application of the minimum wage, Madelaine's rights are settled: from time to time, Madelaine paid some new or current employees, as appropriate, more than the minimum wage. If the Employer felt that certain employees were qualified, or doing a very good job, the Employer could elect to pay and at times did pay, more than the minimum wage. This was done with the knowledge and consent of the Union. There has never been an objection to that process. There has never been a grievance filed by the Union. There has never been anything complained of by the Union. The result is that there is a long bargaining history between these Parties, proving that Madelaine reserved the right in the applicable CBAs to pay minimum wage, or more than the minimum wage as circumstances dictated. And, as

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the current mega increases in New York City, and Madelaine bargained for and received these protections in the CBA expressly to address those concerns. (TR 172-173).

This testimony reinforces Madelaine's position that its rights under Article 8, Paragraph B superseded the shift differential past practice, if there was one.

We discuss the ALJ's extraordinarily incorrect and inappropriate credibility analyses regarding Mr. Wright below.

the minimum wage increased, Madelaine had the same right to pay the minimum wage with no requirement of differential pay.

The bottom line financial and legal issue before the Board is whether Madelaine was required to pay a wage differential to employees on the Second and/or Third shifts, in the face of an aggressive New York state increase in Minimum Wage to $15.00 per hour when Article 8.B. of the CBA allowed Madelaine to pay minimum wage – and not more.

Madelaine emphasizes the CBA expressly allowed payment of minimum wage rates to its employees as the minimum wage rose. That right was negotiated and inserted into the CBA by mutual agreement. Therefore, there was not, and could not be, any impediment to Madelaine from utilizing and implementing a contractual clause designed to protect its financial interests, we state emphatically: an employer is not required to negotiate about a CBA Provision that already exists. To the extent Madelaine is accused of not negotiating about the effects of implementation of that clause, Madelaine contends it did not have to, but it did do so. There were numerous ongoing negotiations between these parties, as even the ALJ agrees. Decision P. 2, LL 25-34.[7]

[7] In Madelaine's Brief we showed that the ALJ's credibility determinations (D.P3, FN 3 FN 4, FN 5) should not be accorded the usual deference allowed administrative law Judges' credibility determinations in NLRB cases. We therefore urge the Board to look beyond the usual credibility reliance on the ALJ, to reject his determinations, and to find the two Madelaine witnesses credible.

In Madelaine's Brief, we described that the failure of proof by the General Counsel is profound.

CONCLUSION

We have emphasized that the burden of proof is on the General Counsel to prove all phases of its case. Madelaine submits that the General Counsel has failed to meet its burden of proof for each and every alleged illegal claim asserted against Madelaine.

In contrast to that failure, Madelaine has proved:

- The shift differential was a non-binding voluntary extension of benefits.
- There is no credible, non-hearsay evidence on the record that the employees on the Afternoon or Night shifts relied on the alleged shift differential as a binding, past practice.
- Madelaine had the right, in its sole discretion, to apply the minimum wage to newly hired employees, or existing employees, even mid-contract.
- All Madelaine employees on all three shifts were, as a matter of contract and/or fact, new hires subject to the employer's minimum wage rights.

- Madelaine properly paid the $13.00 minimum wage and $15.00 minimum wage without obligation of a shift differential to Afternoon or Evening employees.
- The $13.00 minimum wage "subsumed" a previously given $1.10 differential, and therefore, the most Madelaine owes any employees for 2017 is $0.09.
- Madelaine, in any event, without obligation, discussed and negotiated all these issues, with the Union, to impasse.
- The Complaint cannot be allowed to apply to Afternoon employees, when no charge was filed covering Afternoon, Second shift employees.

We respectfully submit the Complaint should be dismissed.

Respectfully,

By: _____
/s/ ABRAHAM BORENSTEIN, ESQ.
BORENSTEIN MCCONNELL & CALPIN, PC

Dated: January 23, 2020

Served by electronic means and UPS overnight mail on the General Counsel and Union.

/s/ Abraham Borenstein, Esq.